88-2131

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

CASE NO_____

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF GEORGIA *

Appellant *

vs. *

MICHAEL SMITH *

Appellee *

FROM THE SUPREME COURT OF GEORGIA

PETITION FOR CERTIORARI

TIM MADISON
DISTRICT ATTORNEY
PIEDMONT JUDICIAL CIRCUIT

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QUESTIONS FOR REVIEW

I.

DOES THE DEFENDANT'S RIGHT TO CONFRONTATION OUTWEIGH THE IMPORTANT AND LEGITIMATE STATE INTEREST OF PROTECTING THE CHILD VICTIMS OF RAPE AND CHILD MOLESTATION FROM SCRUTINY OF THEIR SEXUAL EXPERIENCES?

II.

DOES THE RULING OF THE GEORGIA SUPREME COURT THAT DEFENDANT'S CONSTITUTIONAL RIGHT TO CONFRONTATION IS DENIED UNDER THE GEORGIA RAPE SHIELD STATUTE INFRINGE UPON THE RESERVED POWER OF THE STATE TO PROTECT ITS CHILDREN FROM SEXUAL ABUSE?

TABLE OF CONTENTS

QUESTION FOR REVIEW

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES. 2

STATEMENT OF JURISDICTION 3

CONSTITUTIONAL PROVISIONS INVOLVED. 5

STATEMENT OF CASE 6

ARGUMENT. 9

APPENDIX. 19

TABLE OF AUTHORITIES

Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

Cooper v. Georgia, 256 Ga. 631, 352 SE2d 382 (1987).

Cooper v. Georgia, 180 Ga. App. 37, 348 SE2d 486 (1986).

Davis v. Alaska, 415 U.S. 308 (1974).

Hardy v. Georgia, 159 Ga. App. 854, 285 SE2d 547 (1981)

Johnson v. Georgia, 146 Ga. App. 277, 246 SE2d 263 (1978)

Teague v. Georgia, 208 Ga. 459, 67 SE2d 467 (1951).

Tucker v. Georgia, 173 Ga. App. 742, 327 SE2d 852 (1985).

Ga. Code Annotated §24-2-3 (1981).

Can Georgia's Rape Shield Statute Withstand a Constitutional Challenge?, 36 Mercer l. Rev. 991, at 999 (1985).

STATEMENT OF JURISDICTION

On March 16, 1989, the Supreme Court of Georgia reversed the convictions of rape, statutory rape, child molestation, and cruelty to children imposed on Michael Smith, the defendant.

Pursuant to the Rules of the Supreme Court of the State of Georgia, the State of Georgia, by and through the District Attorney for the Piedmont Judicial Circuit, filed a Motion for Reconsideration on March 21, 1989. On March 29, 1989, the Supreme Court of Georgia denied the State's Motion for reconsideration. The State of Georgia, through the District Attorney for the Piedmont Judicial Circuit, filed a Motion to Recall the Remittitur on April 5, 1989, thereby notifying the Supreme Court of Georgia of the State's intent to seek a Writ of Certiorari to review the judgment of March 16, 1989.

Jurisdiction is conferred on this Court to review the judgment of the Georgia Supreme

Court by Writ of Certiorari through 28 U.S.C. §2101 and Rules 17 & 20 of the Rules of the Supreme Court of the United States.

U.S. CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the State's respectively, or to the people.

STATEMENT OF THE CASE

On November 25, 1987, the defendant, Michael Smith, was convicted in the Superior Court of Barrow County, Georgia of rape, statutory rape, child molestation and cruelty to children. The trial court ruled that the statutory rape conviction merged with the rape conviction, and the trial court sentenced Smith to serve twenty (20) years for rape and statutory rape. The trial court sentenced Smith to serve five (5) years for child molestation and five (5) years for cruelty to children.

Michael Smith, the defendant, repeatedly molested and raped Jennifer Ramey, during the period of December, 1986 through the summer of 1987...Jennifer was the daughter of Smith's live-in girlfriend. On one occasion Smith threatened the victim with a nail gun should she ever tell anyone of his sexual acts with her. Smith offered Jennifer money to tell that he had not sexually molested her.

The State's case in chief consisted of testimony of the victim, a child and adolescent counselor, a Department of Family and Children Services Social Service Specialist, and an Investigator for the Barrow County Sheriff's Department.

Smith, outside the presence of the jury, proffered the testimony of ten witnesses alleging past false accusations by the victim of sexual abuse by men other than defendant.

Pursuant to the Georgia Rape Shield statute O.C.G.A. §24-2-3, the trial court did not admit the evidence. The court did allow testimony from six defense witnesses who testified of the victim's reputation for untruthfulness, propensity to tell lies, and unbelievability under oath.

The case was submitted to the Georgia Supreme Court by briefs without oral arguments on August 12, 1988. The Supreme Court of Georgia held that the trial court's denial of

the proffered testimony was error and reversed the convictions. The Georgia Supreme Court relying on at least four other State's courts of last resort held that "the evidentiary rule preventing evidence of specific acts of untruthfulness must yield to the defendant's right of confrontation..." This ruling infringes upon the important State interest of protecting children from sexual assaults.

ARGUMENT FOR ALLOWANCE OF WRIT OF CERTIORARI

Georgia's Rape Shield statute found at O.C.G.A. §24-2-3 provides that evidence relating to the past sexual behavior of the complaining witness is not admissible in any prosecution for rape. Evidence relating to past sexual behavior of the victim may not be entered on direct or cross-examination of the complaining witness. The rape shield law prohibits traditional impeachment techniques as a means of introducing evidence of the victim's past sexual behavior. The statute allows for two exceptions to prohibition of evidence of past sexual behavior. Evidence of past sexual behavior will be admissible if it is used to prove the past sexual behavior directly involved the defendant, or the defendant could have reasonably believed the victim consented to the sexual conduct. O.C.G.A. §24-2-3(b); Tucker v. State, 173 Ga. App. 742, (327 SE2d852) (1985); Johnson v.

State, 146 Ga. App. 277, (246 SE2d 263) (1978) The purpose of the rape shield law is to eliminate the idea that women of promiscuous sexual reputations are entitled to less protection under rape laws than women with chaste reputations. Hardy v. State, 159 Ga. App. 854, (285 SE2d 547) (1981). The "threshold determination" regarding the falsity of the victim's statements regarding past sexual misconduct as required by the Georgia Supreme Court will subject the victim to scrutiny of her sexual experiences. Women have often failed to report rapes due to the fact that they, rather than the defendant, would be subjected to intense scrutiny. The State of Georgia Legislature in an effort to afford protection to victims of the crime of rape passed the Rape Shield law to encourage the reporting of rapes and to further the important State interest in protecting its citizens from the commission of crime. The right of the State to protect its

citizens from crime is a right specifically reserved to states under the Tenth Amendment of the United States Constitution.

The important interest of the State of Georgia to protect adult female victims from rape and sexual attack is even more compelling when focussed on the protection of children who have experienced sexual abuse. The trauma of testifying in such cases is great on any woman and is compounded when the victim is a ten year old child as in this case. The trauma of testifying will be enhanced for a child who is subjected to cross-examination about prior sexual acts. Children often recant their reports of sexual abuse when they realize they will have to testify in court and confront the very person who has subjected them to the pain and embarrassment of rape and sexual abuse. With the ruling of the Georgia Supreme Court, more children will recant reports of sexual abuse when faced with the "threshold

determination" as to the falsity or truthfulnes of past sexual misconduct. Certainly there wil be more children who will simply fail to repor the abuse, if they are not protected from bein questioned about prior sexual experience in th Court proceedings.

The Georgia Supreme Court recognized th effects of allowing the defense to cross-examin the victim about specific acts of unchastity i Teague v. State, 208 Ga. 459, 67 SE2d 467 (1951 by providing:

> "To permit evidence of specific acts, would also open the gates of circumstantial evidence as to every act and statement of the female in her past life. Any indiscreet conduct or misconduct statement could be implied as an admission of, or as being agreeable to, sexual relations. At times even her silence could be

given a sexual significance." Id. at 466, SE2d, at 472.

The Supreme Court of Georgia failed to recognize the very fears expressed in Teague in its decision in Smith.

The Georgia Supreme Court agreed with the defendant, Michael Smith, that the non-admission of testimony regarding alleged past false accusations by the victim of sexual misconduct by men other than the defendant was in violation of defendant's right of confrontation.

This Court in Mattox v. United States, 156 U.S. 237 (1895) held that "technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused and farther than the safety of the public will warrants." Id. at 243. In Chambers v. Mississippi, 410 U.S. 284, 295 (1973) this Court provided that "The right to confront and to cross-examine...may, in appropriate cases,

bow to accommodate other legitimate interests i
the criminal trial process." There is n
greater interest than the protection of th
citizens of Georgia from crime and affording a
avenue in which adult and child female victim
have an opportunity to report rapes without fea
of scrutiny into their sexual past.

In Davis v. Alaska, 415 U.S. 308, (1974)
Davis was charged with breaking into a taver
and stealing a safe with cash and checks. Id
at 310. The State introduced a youth, who ha
been adjudicated delinquent and was on probatio
for burglary, as its primary witness. Id. a
310-11. Davis' attorney was precluded fro
impeaching the youth by a State statute whic
preserved the confidentiality of juvenil
adjudicaticus of delinquency. Id. at 311
Davis' attorney sought to impeach the youth b
showing that the youth's testimony resulted fro
fear of possible probation revocation. Id. a
311. This Court held that "the State's polic

interest in protecting the confidentiality of a juvenile offender's record cannot require are yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." Id. at 320. From Davis it was determined by this Court that the State's lone interest of protecting the reputation of a witness will not suffice to allow an infringement upon one's right to confrontation. Can Georgia's Rape Shield Statute Withstand a Constitutional Challenge?, 36 Mercer L. Rev. 991, at 999 (1985).

However, in the instant case the State is not resting upon a lone interest. The interests sought to be protected by the State are as follows:

1) Protection of the children of the State of Georgia from child abuse;

2) The protection of female victims from the scrutiny into

past sexual activity;

3) The encouraging of adult females and female children to report rapes, and

4) To protect the citizens of Georgia from criminal acts and to encourage the victims of crimes to bring the perpetrators of the crimes to justice.

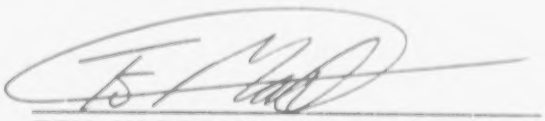
The law has long been concerned with th need to protect children in their tender years The Georgia Supreme Court recognized this i affirming the case of Cooper v. Georgia, 256 Ga 631, 352 SE2d 382 (1987). The Georgia Court o Appeals, in its Cooper decision found that, "Th law, as a matter of policy, has always bee concerned with the rights of children of tende years...in recognition of their lack of lega judgment or discretion and their inability t protect themselves..." Cooper v. Georgia, 18 Ga. App. 37, 348 SE2d 486 (1986). Th

protection afforded to children of rape and sexual abuse through the Georgia Rape Shield statute is an extension of the policy of the laws to protect children of tender years. To subject a child of sexual abuse to a threshold determination as to the falsity or truthfulness of accusations of prior sexual misconduct committed against them would place the child in a position of defending herself against an attack as to previous sexual encounters. What effect will this have on the child if the accusation of prior sexual misconduct is found to be truthful? What will become of the child who had come to the Court for support but in turn is subjected to assaults as to her veracity?

The law has made it a point to protect children. Children must be afforded this protection due to their vulnerability. The Georgia Rape Shield statute affords protection to victims of tender years. The decision of the

Georgia Supreme Court in this case has had the effect of removing the protection afforded to child victims of rape. The determination required as to the child's previous allegations of sexual abuse will only work to expose the pain and suffering of the previous abuse. The scars of sexual abuse run deep and are not easily made over. Children of sexual abuse often grow up to be troubled adults. The State has an important, if not an imperative, interest to protect its children from sexual abuse.

These important interests of the State outweigh the defendant's right to confrontation. This is an appropriate case in which the right to confront and to cross-examine must bow to accommodate the legitimate interest of the State to protect its children.



TIM MADISON
DISTRICT ATTORNEY
PIEDMONT JUDICIAL CIRCUIT
STATE BAR #465536

APPENDIX

IN THE SUPREME COURT OF GEORGIA

DECIDED: MARCH 19, 1989

45967. SMITH V. THE STATE

BELL, Justice.

The appellant, Michael Smith, was convicted of rape, child molestation, and cruelty to children, and was sentenced to terms of imprisonment. Smith appeals and we reverse.[1]

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[1] The alleged offenses occurred between June 1 and Sept. 24, 1987. The grand jury for the Nov. 1987 term of Barrow Superior Court indicted Smith. Smith was tried on Nov. 23-25, 1987. The jury convicted Smith on Nov. 25. Ruling that the statutory rape conviction merged with the rape conviction, the court imposed one 20-year sentence for rape and statutory rape. The court imposed two five-year prison terms for child molestation and cruelty to children. On Dec. 1, 1987, Smith moved for a new trial. The court reporter certified the transcript on May 31, 1988. Smith amended his motion for a new trial on June 16, and the court denied the motion on June 17, 1988. Smith filed his notice of appeal the same day. The clerk of the superior court certified the record on June 27, 1988. The clerk of this court docketed the appeal on July 1, 1988. The case was submitted on briefs without oral arguments on August 12.

The main issue on appeal is whether OCGA §24-2-3, commonly referred to as the rape-shield law, bars admission of testimony regarding the victim's alleged past false accusations against persons other than the defendant.

Smith and his son lived with the victim, her brother, and her mother. As proof of the alleged offenses, the state offered testimony of an expert witness on "child abuse syndrome," testimony of two social workers, testimony of an investigator from the sheriff's department, and the victim's own testimony.

Outside the presence of the jury, Smith proffered the testimony of ten witnesses, including himself, regarding alleged past false accusations by the victim of sexual misconduct by men other than the defendant. Five testified that they had heard that the victim made similar allegations against them; each witness denied any such wrongdoing. Another witness testified that he had heard about similar allegations

against him and that the victim had recanted in his presence; this witness also denied any wrongdoing. Two other witnesses testified that they were present when the victim recanted some of the allegations against persons other than Smith, and a ninth witness testified that she heard similar allegations and that she heard the victim recant these allegations. The defendant stated that the victim had made similar allegations against "ten or twelve" people and had recanted at least some of these accusations.

The court did not admit this evidence because it found that the rape-shield law, as construed in Taylor v. State, 183 Ga. App. 314, 316 (7) (358 SE2d 845) (1987), barred its admission.[2] The court did allow testimony from several defense witnesses regarding the victim's

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[2] Some of the proffered testimony may be subject to other objections, such as hearsay. However, because the objection to this proffered evidence was based solely on the rape-shield law, and because the trial court excluded the testimony on that ground, we need not rule on this question now.

reputation for truthfulness. These witnesses stated that the victim had a poor reputation for truthfulness and that they would not believe her under oath.

1. Initially, Smith contends that the rape-shield law does not prohibit evidence that the victim had lied about sexual misconduct by men other than him, and that if the law is so construed, the law is unconstitutional as violating his right of confrontation. We agree that the rape-shield law does not prohibit such testimony.

OCGA §24-2-3 prohibits testimony regarding the victims "past sexual behavior." Numerous other courts have faced the issue presented by this appeal, and have ruled that evidence of prior false allegations by the victim does not fall within the proscription of rape-shield laws. The courts have reasoned that the evidence does not involve the victim's past sexual conduct but rather the victim's

propensity to make false statements regarding sexual misconduct. E.g., Clinebell v. Commonwealth, 368 SE2d 263, 264-265 (1) (Va. 1988); Commonwealth v. Bohannon, 378 NE2d 987, 991-92 (10) (Mass. 1978); Little v. State, 413 NE2d 639, 643 (Ind. App. 1980); Cox v. State, 443 A2d 607, 613 (Md. App. 1982). We find the reasoning of these cases persuasive, and hold that §24-2-3 does not prohibit testimony of previous false allegations by the victim.[3]

We now turn to the state's argument that, even if the rape-shield law does not prohibit such testimony, the testimony relates to the victim's character, which can only be attacked

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[3] As previously noted, the trial court in the instant case relied on the decision of the Court of Appeals in Taylor, supra, 183 Ga. App. at 316 (7), in excluding the proffered testimony. However, the Taylor opinion does not indicate whether the evidence offered by the defendant involved prior false accusations by the victim. In any event, in view of the holding in the present case, Taylor can no longer be read to support the position urged by the state and relied on by the trial court.

by evidence of the victim's general reputation for veracity. See OCGA §24-2-2 and §24-9-84. The state argues that any specific instances of untruthfulness are prohibited. However, regarding evidence that the prosecutrix in a sex-offense case has made prior false accusations against men other than the defendant, a majority of jurisdictions that have considered the question have held that the evidentiary rule preventing evidence of specific acts of untruthfulness must yield to the defendant's right of confrontation and right to present a full defense. These courts have held that evidence of prior false accusations is admissible to attack the credibility of the prosecutrix and as substantive evidence tending to prove that the instant offense did not occur. E.g., Clinebell, supra, 368 SE2d at 265-266; Commonwealth v. Bohannon, supra, 378 NE2d at 990-991; West v. State, 719 SW2d 684, 687 (Ark. 1986); People v. Adams, 243 Cal. Rptr. 580, 583-

584 (Cal. App. 1988); People v. Hurlburt, 33 P2d 82, 87-88 (Cal. App. 1958); State v. Anderson, 686 P2d 193, 198-201 (Mont. 1984). See generally Galvin, Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade, 70 Minn. L. Rev. 763, 858-863 (1986).

However, the courts that have considered such evidence have ruled that, before such evidence can be admitted, the trial court must make a "threshold determination [outside the presence of the jury] that a reasonable probability of falsity exists. [Cites omitted]." Clinebell, supra, 368 SE2d at 266. This rule helps protect the prosecutrix from unfounded allegations that she has made similar allegations in the past, and we hereby adopt it for future cases in this state.

Because the trial court erred in excluding the proffered testimony based on the rape-shield statute, and because we cannot

conclude that such error was harmless, we must reverse Smith's convictions. However, one other enumeration by Smith requires discussion as the as the issue could recur on remand.

2. Following the testimony by several defense witnesses that they would not believe the victim under oath, the trial court permitted the state's child-abuse expert to testify that, in her opinion, the victim told the expert the truth regarding the allegations against Smith in the expert's interviews with the victim. She also added that "[s]he [the victim] is upset about being away from her mother, but she's telling the truth, and she's not going to go back on it regardless of the consequences...."

The court permitted this testimony over the defendant's objection, and on appeal Smith argues that the trial court erred. We agree.

The rule in this state is that "an expert may not testify as to his opinion as to the existence vel non of a fact...unless the

inference to be drawn from the facts in evidence is beyond the ken of the jurors -- that is, unless the jurors, for want of specialized knowledge, skill, or experience, are incapable of drawing -- from facts in evidence -- such an inference for themselves. Smith [v State, 247 Ga. 612, 619 (277 SE2d 789) (1981)]." Allison v. State, 256 Ga. 851, 853 (5) (353 SE2d 805) (1987). In the present case, the truthfulness or credibility of the victim was not beyond the ken of the jurors. The trial court therefore erred in permitting the testimony in question. Allison, supra, 256 Ga. Cf. United States v. Azure, 801 F2d. 336, 339-341 (8th Cir. 1986).

Judgment reversed. All the Justices concur, except, Hunt, J., who concurs specially as to Division 2, and Marshall, C.J., who dissents to Division 2 but not to the judgment.

45967. SMITH v. THE STATE.

HUNT, Justice, concurring specially.

As to division 2, I agree that an expert's testimony that a particular victim in a child abuse case is being truthful is inadmissible. However, it is entirely permissible for an expert on child abuse to testify about the typical characteristics of child abuse victims. See Smith v. State, 247 Ga. 612 (277 SE2d 789) (1981). The expert may testify that the victims do not, in general, lie about the abuse. This is an evaluation, based on scientific study, which is not within the ken of the average juror. See, State v. Butler, 256 Ga. 448 (349 SE2d 684) (1986). It is then the jury's duty, aided by the expert's opinion regarding the general propensity for victims of child abuse to be truthful about the abuse, to determine whether the particular victim is truthful.

Clerk's Office, Supreme Court of Georgia

ATLANTA MAR 2 9 1989

The motion for a rehearing was denied today:

Case No. 45967. Smith v. The State

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

CERTIFICATE OF SERVICE

TO: JERRY C. GRAY, P.O. BOX 494, JEFFERSON, GA 30549

This is to certify that I have this day served the opposing party with a copy of the foregoing pleading by depositing same in the United States Mail in a properly addressed envelope with adequate postage thereon.

This 26 day of May, 1989.

TIM MADISON
DISTRICT ATTORNEY

BEST AVAILABLE COPY